

1 RUSSELL M. SELMONT (SBN 252522)
rselmont@ecilaw.com

2 **ERVIN COHEN & JESSUP LLP**
9401 Wilshire Boulevard, Ninth Floor
3 Beverly Hills, California 90212-2974
4 Telephone (310) 273-6333
Facsimile (310) 859-2325

CARL OPPEDAHL (*Pro Hac Vice* - CO SBN. 27859)
carl2@oppedahl.com

6 AILEEN LAW (*Pro Hac Vice* – CO SBN 33043)
7 alaw@oppedahl.com
MCGAHEY STEPHENSON, LLP CO SBN 47824

8 MICAH GUNN (*Pro Hac Vice* – CO SBN 47934)
mgunn2@oppedahl.com

OPPEDAHL PATENT LAW FIRM LLC
P.O. Box 660

9 P O Box 669
Broomfield, Colorado 80038-0669
10 Telephone (303) 252-8800

11 | Attorneys for Plaintiff WEBMAGIC VENTURES, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

16 WEBMAGIC VENTURES, LLC, a California limited liability company,

Plaintiff,

v.

DEUX RON, INC., a Tennessee corporation; RON HENSLEY, an individual; and ERIC HENSLEY, an individual.

Defendants

Case No. 2:18-cv-5933-PA-AS

Hon. Percy Anderson – Crtrm. 9A

**PLAINTIFF WEBMAGIC
VENTURES, LLC'S OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS PURSUANT TO RULES
12(B)(2), 12(B)(3), OR IN THE
ALTERNATIVE, TO TRANSFER
VENUE UNDER 28 U.S.C. §§ 1404,
1406 1631**

Date: August 27, 2018
Time: 1:30 p.m.
Place: Courtroom 9A

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1 Plaintiff WebMagic Ventures, LLC. ("Plaintiff") respectfully submits its
 2 Opposition to Defendants' Motion to Dismiss (the "Motion to Dismiss" or "Motion")
 3 filed by Defendants Deux Ron, Inc., Ron Hensley, and Eric Hensley (collectively,
 4 "Defendants", individually, "Ron" and "Eric").

5 **I. JURISDICTION OVER DEFENDANTS RON AND ERIC HENSLEY IS**
 6 **COMMENSURATE WITH JURISDICTION OVER DEFENDANT**
 7 **DEUX RON, INC.**

8 Although Defendants never use the term, they appear to rely on the fiduciary
 9 shield doctrine to argue that jurisdiction is not proper over Ron and Eric Hensley.
 10 Defendants assert that "neither Ron Hensley nor Eric Hensley individually used the
 11 allegedly infringing mark in California or elsewhere". (*See generally*, Defs.' Mot. at
 12 5.) This assertion is made despite the sale of gift cards sold into California by
 13 Defendant Deux Ron, Inc. bearing the infringing mark which is the subject of this
 14 Complaint.

15 Ron and Eric's intimation that they are protected by some corporate veil is
 16 irrelevant. Piercing the corporate veil is relevant only to contract causes of action.
 17 The present trademark infringement action arises under Tort law where there is no
 18 protective corporate veil. The individual causing a tort to occur is liable in a way
 19 that is not affected by the existence of corporations or other legal entities.

20 In Tort actions the long accepted principles of *Respondeat Superior* would
 21 hold Ron and Eric liable for the claimed infringement committed by an employee of
 22 their company, Deux Ron, Inc., if the employee committed the tort in the scope of
 23 his employment and in performing service on behalf of the principals, Ron and Eric.
 24 *See Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal. App.4th
 25 953, 969 (internal citations omitted). It does not matter whether the tort was
 26 authorized or ratified by the principals. *Id.* at 969.

27 The fiduciary shield doctrine prevents a court from exercising personal
 28 jurisdiction over an officer, director, agent, or employee of a corporation based

1 solely on the person's affiliation with the corporation. *Davis v. Metro Prods., Inc.*,
2 885 F.2d 515, 520-21 (9th Cir. 1989). But even assuming that the doctrine is viable
3 and applicable, courts will disregard the corporate form for jurisdictional purposes
4 where the officer is a "primary participant in the alleged wrongdoing or had control
5 of, and direct participation in the alleged activities", *Allstar Marketing Group, LLC*
6 v. *Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1120 (C.D. Cal. 2009) (internal
7 quotation marks omitted), or the corporation is the alter ego of the individual
8 defendant. *Wolf Designs, Inc. v. DHR Company*, 322 F. Supp. 2d 1065, 1072 (C.D.
9 Cal. 2004)

10 Here, at a minimum, Ron and Eric were the primary participants and directed
11 the wrongdoing alleged in the Complaint. (See generally, Ron Decl.; see also Eric
12 Decl.) Deux Ron, Inc. is a family-run business with Patriarch Ron Hensley and Son
13 Eric Hensley serving as President and Vice President, respectively. (See Ron Decl.
14 ¶¶ 1, 3; Eric Decl. ¶¶ 1, 3) Deux Ron, Inc., actually bears Ron's given name. Ron
15 and Eric are also the only two individuals providing declarations containing intimate
16 details of Deux Ron, Inc.'s business.

17 In their Declarations Ron and Eric provide details pertaining to Deux Ron,
18 Inc.'s business operations and activities; ownership and use of the relevant mark;
19 relevant goods/services and markets for those goods/services under the relevant
20 mark; trade channels for the relevant goods/services; advertising and marketing
21 decisions regarding the mark at issue; and enforcement efforts. (See Ron Decl. ¶¶ 1,
22 5; Eric Decl. ¶¶ 1, 5) They also acknowledge that their business has fulfilled at least
23 one online order to a customer having a California address. (Ron Decl. ¶¶ 9; Eric
24 Decl. ¶¶ 11) Their intimate knowledge of Deux Ron, Inc.'s affairs supports the
25 belief that they are the only persons that could have controlled and directed the
26 actions which allowed this infringing activity to occur.

27 As the Complaint alleges, Defendants operate a website which infringes upon
28 Plaintiff's trademark rights. (Compl. ¶¶ 6, 9) Defendants also sell gift cards called

1 "Arcadia cards" online ("Arcadia cards") which also infringe upon Plaintiff's
 2 trademark rights. (Compl. ¶ 4) Ron and Eric's involvement in these activities and
 3 their respective roles as President and Vice President supports a presumption that
 4 they control all the activities of the organization. (See Ron Decl. ¶ 1; Eric Decl. ¶ 1)

5 It is believed that Ron and Eric as President, Vice President, and controlling
 6 officers play an active role in conducting not just the business affairs of Deux Ron,
 7 Inc., but also its litigation matters such as by volunteering declarations and to
 8 competently testify with personal and first-hand knowledge. *Id.* As such, personal
 9 jurisdiction over all defendants is proper for the reasons discussed below.

10 **II. THIS COURT HAS SPECIFIC JURISDICTION OVER DEFENDANTS**

11 Absent an evidentiary hearing, plaintiffs need only make a *prima facie*
 12 showing of jurisdictional facts to withstand a motion to dismiss for lack of personal
 13 jurisdiction. *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 671-
 14 72 (9th Cir. 2012). Plaintiff's allegations must be taken as true, unless directly
 15 controverted, and conflicts between facts in the parties' affidavits must be resolved
 16 in Plaintiff's favor for purposes of *prima facie* jurisdictional analysis. *Dole Food*
 17 *Co., Inc., v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

18 Because California's long-arm statute permits a District Court to exercise
 19 personal jurisdiction over a nonresident on any basis that will not violate due
 20 process, the traditional two-step analysis collapses into a single question of whether
 21 exercising personal jurisdiction comports with Federal Due Process requirements.
 22 Cal. Civ. Code § 410.10; *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320
 23 (9th Cir. 1998). Federal Due Process provides for two types of personal
 24 jurisdiction—general and specific jurisdiction. Defendants are subject to specific
 25 jurisdiction in this case.

26 The Ninth Circuit analyzes specific jurisdiction using a three-part test:

27 (1) the non-resident defendant must purposefully direct his
 28 activities or consummate some transaction with the forum
 or resident thereof; or perform some act by which he

1 purposefully avails himself of the privilege of conducting
 2 activities in the forum, thereby invoking the benefits and
 3 protections of its laws; (2) the claim must be one which
 4 arises out of or relates to the defendant's forum-related
 activities; and (3) the exercise of jurisdiction must
 comport with fair play and substantial justice, i.e. it must
 be reasonable.

5 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

6 While Plaintiff must establish the first two prongs, Defendants bear the burden of
 7 presenting "'a compelling case' that the exercise of jurisdiction would not be
 8 reasonable." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78
 9 (1985)).

10 A. **Defendants Purposefully Directed Activity into California and**
 11 **Purposefully Availed Themselves of the Laws of California.**

12 In trademark claims, the Ninth Circuit courts consider whether a defendant
 13 (1) "purposefully availed" itself of the privilege of conducting activities in the
 14 forum, or (2) "purposefully directed" activities toward the forum. *Schwarzenegger*,
 15 374 F.3d at 802. Evidence of availment is typically action taking place in the forum
 16 that invokes the benefits and protections of the laws in the forum. *See Pebble*
 17 *Beach Co. v. Caddy*, 453 F.3d 1151, 1157 (9th Cir. 2006). Evidence of direction
 18 generally consists of action taking place outside the forum that is directed at the
 19 forum (suggesting evidence of purposeful direction includes activities such as
 20 distribution and advertising). *Id.* The court has specific jurisdiction over
 21 Defendants under both purposeful availment and direction.

22 ***1. Defendants Have Purposefully Availed Themselves of***
 23 ***California's Benefits and Protections***

24 The Ninth Circuit courts use a sliding-scale approach to assess purposeful
 25 availment through use of the internet. *American Auto Ass'n, Inc. v. Darba*
 26 *Enterprises, Inc.* (N.D. Cal. 2009), 2009 WL 1066506 at *4. As that case explained,

27 At one end of the scale are 'passive' websites which merely
 28 display information, such as an advertisement. Personal
 jurisdiction is not appropriate when a website is merely

1 passive. At the other end of the scale are "interactive"
2 websites which function for commercial purposes and
3 where users exchange information. Personal jurisdiction
4 is appropriate when an entity is conducting business over
5 the internet. Where a website is somewhere between the
6 two extremes, the likelihood that personal jurisdiction can
7 be constitutionally exercised is directly proportionate to
8 the nature and quality of commercial activity that an entity
9 conducts over the internet.

10 7 *Id.* (citations omitted). Purposeful availment exists where the defendant engaged in
11 affirmative conduct furthering a business transaction within the forum state and is
12 based on the notion that a person doing business in a state should reasonably
13 anticipate being haled into court in that state. *Allstar Marketing Group, LLC v. Your*
14 *Store Online, LLC*, 666 F. Supp. 2d 1109, 1119 (C.D. Cal. 2009). Courts also find
15 purposeful availment when a defendant deliberately has created continuing
16 obligations between himself and residents of the forum. *Burger King Corp. v.*
17 *Rudzewicz*, 471 U.S. 462, 476 (1985).

18 15 Defendants maintain an interactive website and make no attempt to dispute
19 this fact. Defendants admit to operating the website www.gatlinburgarcade.com
20 ("website") through which they have serviced "4,607 online orders for goods and
21 services made through Deux Ron's website during the past ten years." (Defs.' Mot. at
22 2, 9; Ron Decl. ¶ 9; Eric Decl. ¶ 11.) Defendants readily acknowledge fulfilling at
23 least one online order to a customer in California. (Defs.' Mot. at 2, 9; Ron Decl. ¶
24 9; Eric Decl. ¶ 11.)

25 22 Defendants also maintained a record of these online sales. (Defs.' Mot. at 9;
26 Ron Decl. ¶ 9; Eric Decl. ¶ 11.) The records include customer information such as
27 email address, full name, phone number, billing address, and shipping address as
28 evidenced by a purchase made on July 30, 2018 by California resident Aaron Croft
("Mr. Croft"). (See Croft Decl. ¶ 12 and Exhibit 13.) Defendants require this
information before a transaction may be completed. (Croft Decl. ¶¶ 5, 12, and
Exhibits 12 – 17.) This information is collected from the customer within the forum

1 state through the Defendants' website which serves as a portal for accessing
2 customers throughout the state. (Croft Decl. ¶¶ 5, 12, and Exhibits 12 – 17.) There
3 can be no doubt, however, that the main purpose of Defendants' website is for
4 commercial gain, not just targeted advertisement.

5 Defendants' website sells a variety of goods including gift card and gift card
6 packages. One such gift card is sold under the infringing term ARCADIA Play
7 Cards ("Arcadia card") and is redeemable only at their Gatlinburg Arcade. (Ron
8 Decl. ¶¶ 8; Eric Decl. ¶¶ 10.) Defendants acknowledge having sold at least one
9 Arcadia card to a California resident out of a total 4,607 online orders. (Defs.' Mot.
10 at 2, 9; Ron Decl. ¶ 9; Eric Decl. ¶ 11.) By selling an allegedly branded product in
11 the state of California the Defendants are availing themselves of the common law
12 trademark protections afforded by California.

13 Furthermore, the Arcadia gift card, by its very nature, creates a continuing
14 obligation between Defendants and any purchaser of that card including the
15 California card holder. It is axiomatic that a gift card is valid until redeemed and
16 places a continuing obligation on the purveyor of the card. *See Burger King Corp.*
17 *v. Rudzewicz*, 471 U.S. 462, 476 (1985) (finding purposeful availment when a
18 defendant has deliberately created continuing obligations between himself and
19 residents of the forum). There could be little doubt in the mind of the Defendants
20 when they sold a purportedly branded gift card to a California resident and became
21 deliberately obligated to that customer that there was a reasonable possibility of
22 being haled into a California court.

23 Defendants argue that they did not personally avail themselves because the
24 transaction was conducted online, they had no physical presence in California, and
25 the customer was allegedly required to pick the gift card up in Tennessee. However,
26 the Defendants deliberately accepted payment for the gift card in California where
27 the transaction took place. Additionally, the affirmative conduct of selling a gift
28 card creates an obligation to the customer wherever they may be whether or not they

1 have physical possession of the card. *See Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d
2 414 (9th Cir. 1997):

3 We recently explained in *Ballard* that the "purposeful
4 availment" requirement is satisfied if the defendant has
5 taken deliberate action within the forum state or if he has
6 created continuing obligations to forum residents. 'It is not
7 required that a defendant be physically present within, or
8 have physical contacts with, the forum, provided that his
9 efforts 'are purposefully directed' toward forum residents.'
10 quoting from *Ballard*, 65 F.3d at 1498 (citations omitted).

11 Defendants emphasize they did not avail themselves because the customer
12 was allegedly required to pick the gift card up in Tennessee. (Defs.' Mot. at 9, 10;
13 Ron Decl. ¶ 9; Eric Decl. ¶ 11.) A party cannot avoid jurisdiction simply by not
14 shipping what was ordered by a paying customer of another state. Furthermore, as
15 discussed, it is reasonable for a customer to expect that the gift card was to be
16 shipped to their "shipping address" since that very information is required from the
17 user during the ordering process. (Croft Decl. ¶¶ 5, 12, and Exhibits 12 – 17.)

18 On July 30 Mr. Croft, a resident of Los Angeles, California, purchased
19 Arcadia cards. (Croft Decl. ¶ 3.) To complete the transaction Mr. Croft was
20 required to provide personal information including his email address, full name,
21 phone number, billing address, and shipping address. (Croft Decl. ¶¶ 5, 12, and
22 Exhibits 12 – 17.) Mr. Croft was also required to select a shipping method. (Croft
23 Decl. ¶¶ 5, 12, and Exhibit 14.) Despite having specifically asked for shipping
24 information and requiring this information in order that a sale be completed,
25 Defendants sent a receipt by email indicating that the "Items will NOT be shipped".
26 (Croft Decl. ¶ 15 and Exhibit 23.) Whether the Defendants had committed
27 themselves to shipping into California remains an open question that the court must
28 resolve in favor of plaintiff. *See Pebble Beach Co.*, 453 F.3d at 1157 (9th Cir. 2006)
("However, this demonstration requires that the plaintiff 'make only a *prima facie*
showing of jurisdictional facts to withstand the motion to dismiss.' *Doe v. Unocal*,
248 F.3d 915, 922 (9th Cir.2001) (internal citations omitted). Moreover, for the

1 purpose of this demonstration, the court resolves all disputed facts in favor of the
 2 plaintiff, here, Pebble Beach. *Id.*."

3 Despite Defendants' insistence that their refusal to ship the gift cards absolves
 4 them from jurisdiction, it is irrelevant that the cards will not be shipped to California
 5 since the transactions occurred in California and Defendants are under a continuing
 6 obligation to said California resident. *See e.g. j2 Cloud Services, Inc. v. Fax87*
 7 (C.D. Cal. 2017) 2017 WL 1535083 at *6 (fact that physical products were not
 8 delivered to forum state did not preclude exercise of jurisdiction).

9 Furthermore, the sale of gift cards to California residents is affirmative
 10 conduct that amounts to an availment to the protections afforded by California's
 11 laws regarding the sale and redemption of gift cards. *See* Cal. Civ. Code § 1749.45
 12 – 1749.6. These laws provide protection to distributors and beneficiaries alike by
 13 providing clarity as to the types of gift card transactions that are permissible. One
 14 protection is the prohibition against gift card expiration dates, however, the gift card
 15 Defendants sold to Mr. Croft was conditioned on an expiration of 365 days from
 16 purchase. Defendants cannot avail themselves of the protections of Cal. Civ. Code §
 17 1749.45 – 1749.6, violate these codes, and expect to then avoid personal jurisdiction
 18 merely by failing to physically deliver the card to the customer (which may also be a
 19 violation of the Code).

20 **2. *Defendants Have Purposefully Directed Activities Towards***
 21 ***California***

22 Because Defendants maintained an "interactive website" – as opposed to a
 23 "passive website" – many of Defendants' acts discussed above also satisfy the
 24 "purposeful direction" test.

25 As described by the Supreme Court in *Calder*, a defendant purposefully
 26 directs his activities towards a forum if he "(1) committed an intentional act, (2)
 27 expressly aimed at the forum state, (3) causing harm that the defendant knows is
 28 likely to be suffered in the forum state." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*,

1 874 F.3d 1064, 1069 (9th Cir. 2017) (quoting *Wash. Shoe Co. v. A-Z Sporting*
2 *Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012)).

3 Defendants' intentional acts include, *inter alia*, registering a website bearing
4 an infringing use of Plaintiff's ARCADIA mark and selling Arcadia cards also
5 bearing that mark through its interactive website. Defendants also solicited
6 information from customers and encouraged them to share the Defendants' website
7 bearing the infringing mark on social media. (Croft Decl. ¶¶ 4 – 6, 12, and Exhibits
8 10 – 13.) Further Defendants applied for a federal US trademark application for the
9 mark ARCADIA in conjunction with infringing services. (Compl. ¶ 22.)

10 As stated, Defendants operate an interactive website. However, for the sake
11 of argument, even if their website were considered passive, Defendants' acts amount
12 to "something more" such as "express aiming as contemplated by the court in
13 *Pebble Beach*.

14 In determining whether a nonresident defendant has done something more,
15 the Ninth Circuit has considered several factors, including the extent of interactivity
16 of the defendant's website, the geographic scope of defendant's commercial
17 ambition, and whether the defendant individually targeted a plaintiff known to be a
18 forum resident. *Inventors Row Inc. v. Blankenship* (E.D. Cal. 2018) 2018 WL
19 2064795 at * 4. District courts in this circuit have generally found that online
20 product sales to residents of the forum are sufficient to satisfy the "something more"
21 requirement in trademark infringement cases. *Id.*

22 In addition to the deliberate act of selling an Arcadia card to Mr. Croft, at the
23 completion of Defendants' transaction, *supra*, Mr. Croft was asked whether he
24 preferred to receive newsletters or special offers. (Croft Decl. ¶¶ 5, 12, and Exhibits
25 12 – 17.) He was also encouraged to share his order on social media which he did
26 on Google+. (Croft Decl. ¶¶ 6, 13, and Exhibits 12 – 17.) Defendants' website also
27 allowed Mr. Croft to create a profile to be added to a database for express targeting
28 and encouraged him to share their infringing website with his contacts throughout

1 California. After creating a profile, Mr. Croft received an email stating "For your
2 convenience, we've created you an account on Gatlinburg Space Needle Store so
3 you can check the status of your order and checkout quicker in the future." (Croft
4 Decl. ¶¶ 4, 14, and Exhibit 22.) This was done with full knowledge of Plaintiff's
5 trademark rights and business operations within California. There can be no doubt
6 that Defendants' actions amount to more than just a "foreseeable effect".
7 Defendants' actions are affirmative acts of purposeful direction.

8 Defendants should have known that their actions were likely to cause harm in
9 California. Defendants had constructive notice of Plaintiff's federal trademark
10 rights. This constructive notice included that the Plaintiff and owner of record,
11 WebMagic Ventures, LLC, operated in California. Defendants could easily foresee
12 that operating an interactive website and selling gift cards into the state of
13 California, both of which infringe upon Plaintiff's trademark rights, would be likely
14 to cause harm in California. Further, Defendants should have known that selling
15 gift cards within California which violate California Civil Code would cause the
16 very harm that the Code was meant to prevent. In any case, in view of the filing of
17 the Opposition Defendants are now charged with having actual notice that their
18 actions are likely to cause harm in California yet they are still selling Arcadia cards
19 in California.

20 Also noteworthy are Defendants' nationwide commercial ambitions. Despite
21 Defendants' assertion that "Deux Ron's business, located in the mountains of eastern
22 Tennessee, is decidedly local", (see, Defs.' Mot. at 1, 10.), the website encouraged
23 Mr. Croft to create a profile to be added to a database for express targeting and
24 encouraged him to share their infringing website with his contacts throughout
25 California. Furthermore, Defendants applied for a federal trademark for nationwide
26 protection under the infringing term ARCADIA. A "decidedly local" business does
27 not need nationwide protection. Their broader commercial ambitions became more
28 clear when they alleged that "Defendants' activities are focused in Tennessee and the

1 Southeast, not California". (Defs.' Mot. at 1, 10.) The internal inconsistencies in
 2 their geographic scope should cast some doubt on their allegations about staying out
 3 of California. Defendants' federal trademark application and sales in California
 4 eliminate any doubt that their commercial ambitions are anything but national.
 5 Further, the business activities providing for jurisdiction throughout the Southeast
 6 are presumably the same business activities that provide for jurisdiction in
 7 California.

8 As discussed, Defendants' directed sales through its website, sold and
 9 accepted payment for gift cards in California, and incurred commercial obligations
 10 arising under these gift cards. It is irrelevant that the cards will not be shipped to
 11 California since the transactions occurred in California and Defendants are currently
 12 under a continuing obligation to at least one California resident, Mr. Croft. *See j2*
 13 *Cloud Services, Inc. v. Fax87.*

14 Furthermore, to the extent Defendants argue that there were only minimal
 15 Yelp reviews/sales in California, the court in *PetEdge, Inc. v. Fortress Secure Sols.,*
 16 *LLC* (D. Mass. 2015) F. Sup. 3d 249, 257 held that the sale of just two products into
 17 Massachusetts was sufficient to confer jurisdiction in a patent infringement case.
 18 Additionally, at least one California case, *Greenbroz, Inc. v. Laeger Built, LLC*
 19 (S.D. Cal. 2017) 2017 WL 1427139, has considered that case in *dicta*. Since the
 20 product offered for sale, the Arcadia card, is directly infringing Plaintiff's trademark
 21 rights, the situations are analogous.

22 **B. Plaintiff's Cause of Action Arises Out of Defendants' Operation of**
its Infringing Interactive Website and Sales.

23 A plaintiff's cause of action arises out of a defendant's contacts where there is
 24 a "direct nexus" between the asserted cause of action and the defendant's activities
 25 in the forum state. *Allstar Marketing Group, LLC*, 666 F. Supp. 2d at 1123. The
 26 Ninth Circuit uses a "but for" test to determine whether the plaintiff's cause of action
 27 arose out of the defendant's conduct. *Id.*

1 Here, Defendants' contacts with the state of California are the "but for" cause
2 of Plaintiff's cause of action. Defendants sold gift cards bearing an infringing mark
3 into California and operated an infringing interactive website that solicited
4 information from customers in California. This information was used to maintain
5 contact in order to allow California customers the ability to "checkout quicker in the
6 future". (Croft Decl. ¶¶ 4, 14, and Exhibit 22.). Defendants' website also
7 encourages and facilitates posting confirmation of such infringing transactions on
8 social media. (Croft Decl. ¶¶ 6, 13, and Exhibits 18 – 21.) "But for" Defendants'
9 infringing sales and operation of its infringing interactive website, Plaintiff would
10 not have a cause of action for trademark infringement.

11 Defendants have failed to meet their burden of presenting a compelling case
12 that the exercise of jurisdiction would not be reasonable.

13 **III. IF THE COURT FINDS INSUFFICIENT INFORMATION TO**
14 **ESTABLISH JURISDICTION, IT SHOULD PERMIT**
15 **JURISDICTIONAL DISCOVERY**

16 If the Court finds that the facts set forth above are not sufficient to support a
17 finding of specific jurisdiction, the Court should permit Plaintiff to conduct limited
18 jurisdictional discovery in order to support its claim. "[W]here pertinent facts
19 bearing on the question of jurisdiction are in dispute, discovery should be allowed."
20 *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 672 (S.D. Cal. 2001)
21 (quoting *Am. West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir.
22 1989)). To obtain jurisdictional discovery, Plaintiff need only establish a "colorable
23 basis" for claiming jurisdiction—a lower standard than a *prima facie* showing.
24 *Mitan v. Freeney*, 497 F. Supp. 2d 1113, 1119 (C.D. Cal. 2007); see also *Harris*
25 *Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir.
26 2003) (finding that a court abused its discretion by not permitting jurisdictional
27 discovery into whether there were additional facts demonstrating that the alter ego
28 or agency tests were met).

1 To the extent the Court determines that Plaintiff has not made a *prima facie*
2 showing of personal jurisdiction, Plaintiff should be permitted to conduct limited
3 jurisdictional discovery regarding at least the following issues:

4 ▪ Defendants' contacts with California, such as visits to the state and
5 business transactions it conducts or has conducted with its residents;
6 ▪ The number of "hits" received by Deux Ron, Inc.'s web page from
7 residents in California;
8 ▪ The corporate structure of Deux Ron, Inc. and Ron and Eric's role within
9 the company;
10 ▪ The extent to which other members of the Hensley family participate in
11 the business of Deux Ron, Inc., their identities, and their duties;
12 ▪ The extent to which Ron and Eric control and direct the activities of Deux
13 Ron, Inc.;
14 ▪ The extent to which Ron and Eric controlled and directed the actions of
15 Deux Ron, Inc. that Plaintiff contends infringed its trademark rights;
16 ▪ The extent to which Deux Ron, Inc. is a separate and distinct entity and
17 identity from Ron and Eric as individuals;
18 ▪ The extent to which Ron and Eric commingles funds with Deux Ron, Inc.;
19 and
20 ▪ The assertions made by Ron and Eric in their Declarations submitted in
21 support of this Motion.

22 **IV. VENUE IN THIS FORUM IS PROPER**

23 Under the general venue statute, a civil action may be brought in (1) a judicial
24 district in which a substantial part of the events or omissions giving rise to the claim
25 occurred; or (2) an action may otherwise be brought as provided in this section, any
26 judicial district in which any defendant is subject to the court's personal jurisdiction
27 with respect to such action. As stated above, Defendants are subject to this Court's
28 personal jurisdiction.

1 Conspicuous by its absence is any assertion by Defendants as to why the
2 Eastern District of Tennessee would at all be an appropriate venue for this action.
3 Defendants merely try to analogize this case to an Arizona District Court holding
4 where the court allegedly found venue improper because the defendant had not sold
5 products or generated business in Arizona from its website. (*See* Defs.' Mot. at 12.)
6 Here, unlike the facts in the Arizona case, as alleged by Defendants, Defendants
7 affirmatively sold gift cards in California, collected payment in California, and
8 generated business in California from its website.

9 Defendants maintain an interactive website bearing an infringing mark. This
10 website is accessible in L.A. County, California. In addition to the one California
11 sale that Defendants acknowledge, Defendants sold an Arcadia card bearing an
12 infringing mark to Mr. Croft, a resident of L.A. County, California. (Mot at 2, 9;
13 Ron Decl. 9; Eric Decl. 11.) Mr. Croft purchased the card and Defendants
14 deliberately accepted payment from Mr. Croft in L.A. County, California.
15 Defendants are obligated to honor the value of the Arcadia gift card to Mr. Croft
16 under the laws of his home state regardless of whether Defendants ship the card or
17 not. As such, this Court is the most appropriate venue for deciding this complaint
18 and Defendants failed to provide any reason whatsoever for transferring this case to
19 the Eastern District of Tennessee.

20 Defendants have failed to provide a claim or any evidence of an undue burden
21 that would be caused by the current venue. Conspicuous by its absence, the motion
22 for change of venue should be dismissed out of hand.

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1 V. **CONCLUSION**

2 Defendants are subject to Specific Jurisdiction in California for their
3 infringing acts. Venue is proper for similar reasons. Therefore, the court should
4 dismiss the Defendants' Motion.

5 Respectfully submitted,

6
7 DATED: August 6, 2018

ERVIN COHEN & JESSUP LLP

8 Russell M. Selmont

9 By: /s/ Russell M. Selmont

10 Russell M. Selmont
11 Attorneys for Plaintiff WEBMAGIC
12 VENTURES, LLC

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CERTIFICATE OF SERVICE

CENTRAL DISTRICT OF CALIFORNIA

WebMagic Ventures LLC v. Deux Ron, Inc., et al.

Case No.: 2:18-cv-PA-AS

The undersigned certifies that on August 6, 2018, the following documents and all related attachments (“Documents”) were filed with the Court using the CM/ECF system.

**PLAINTIFF WEBMAGIC VENTURES, LLC'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULES
12(B)(2), 12(B)(3), OR IN THE ALTERNATIVE, TO TRANSFER
VENUE UNDER 28 U.S.C. §§ 1404, 1406, 1631**

Pursuant to L.R. 5-3.2, all parties to the above case and/or each attorneys of record herein who are registered users are being served with a copy of these Documents via the Court's CM/ECF system. Any other parties and/or attorneys of record who are not registered users from the following list are being served by first class mail.

By: /s/ Russell M. Selmont
Russell M. Selmont